

EXHIBIT 1

**STATEMENT OF DECISION ON DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND STAY
JUDICIAL PROCEEDINGS; ORDER IN THE MATTER
ENTITLED SABANOVICH V. CARMAX AUTO
SUPERSTORES CAL., LLC, STANISLAUS COUNTY
SUPERIOR COURT, CASE NO. 2027406 (MAY 15, 2018)**

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MAY 15 2018

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

JOSHUA SABANOVIC et al.,

Case No.: 2027406

Plaintiffs,

vs.

CARMAX AUTO SUPERSTORES

Statement of Decision on Defendants
CarMax Auto Superstores California, LLC.,
and CarMax Auto Superstores West Coast,
INC.,'s Motion to Compel Arbitration and
Stay Judicial Proceedings; ORDER

CALIFORNIA, LLC et al.,

Date: March 1, 2018

Defendants.

Dept.: 23

Defendants CarMax Auto Superstores California, LLC., and CarMax Auto Superstores West Coast, Inc.,'s Motion to Compel Arbitration and Stay Judicial Proceedings came on regularly for hearing on March 1, 2018 in Department 23 of this court, Judge John D. Freeland presiding. Defendants/moving parties appeared through counsel Jack S. Sholkoff; Plaintiffs appeared through counsel Shannon Seibert. After hearing arguments of counsel, the Court took the matter under submission. The Court issued a Tentative Decision. Plaintiff then filed a Request for Statement of Decision. Defendants then filed their Objections And Response to Plaintiff's Request for Statement of Decision. The Court issued a Proposed Statement of Decision. Nothing was filed by either side in response to the Proposed Statement of Decision. The Court now issues its Statement of Decision to **GRANT** Defendants' motion (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 689.)

1 In deciding a motion or petition to compel arbitration, the Court's inquiry is limited to
 2 two questions: (1) Is there a valid agreement to arbitrate and, if so, (2) does the agreement cover
 3 the dispute or claims at issue? If the answer to both of these questions is "yes," then a court must
 4 compel arbitration. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 960.)

5 Regarding the former, Plaintiff contends that the Dispute Resolution Agreement (DRA)
 6 and the Dispute Resolution Rules and Procedures (DRRP), containing the binding arbitration and
 7 class-waivers on which Defendants rely, are invalid because the entity named in the DRA/DRRP
 8 is not among the entities named as defendants in this action, and because the employee signing
 9 the DRA/DRRP on behalf of Defendants did so only by printed name, rather than by a physical
 10 signature. To the contrary, the Court finds on the basis of the declarations of Hulcher and Ross,
 11 the declaration of Seibert re Surreply, along with Defendants' authorities and other documentary
 12 evidence, that Defendants are, in fact, "subsidiaries or affiliates" of the CarMax entity listed in
 13 the DRA/DRRP, and therefore are parties bound by it with sufficient standing to request specific
 14 performance of its terms. (See, Hulcher Dec., ¶¶ 4-6; Ross Dec., Exhs. A, B [DRA/DRRP, p. 7];
 15 Seibert Dec re Surreply, Exh. D-F; *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 9-10 [defining
 16 "affiliate" as subsidiary, parent, or sibling corporation related by shareholdings or other means of
 17 control].) As for the signature argument, it is not well-taken. As a matter of law, the absence of
 18 the enforcing party's actual signature is immaterial provided, as here, the enforcing party has
 19 either performed or tendered its performance. (Civ. Code § 3388; *Serafin v. Balco Props. Ltd.*,
 20 *LLC* (2015) 235 Cal.App.4th 165, 177.) Furthermore, consent to a written contract may be
 21 implied by conduct. (*DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 812
 22 [signature is not the only form of assent under contract law]; *Craig v. Brown & Root, Inc.* (2000)
 23 84 Cal.App.4th 416, 420 [acceptance of agreement to arbitrate may be implied-in-fact].) Plaintiff
 24 concedes his own knowledge of and signature on the DRA/DRRP, and does not dispute that
 25 Defendants tendered performance by requesting submission of this action to binding arbitration,
 26 which request Plaintiff rejected. Plaintiff's purported distinction of *Serafin, supra*, based on
 27 *Banner Entm't, Inc. v. Superior Court* (1998) 62 Cal.App.4th 34, omits that the case is inapposite
 28 as there was, in fact, no written agreement to arbitrate even considered. (*Banner Entm't, Inc.,*
supra, at pp. 360-361 [it is not the presence or absence of a signature which is dispositive; it is
 the presence or absence of evidence of an agreement to arbitrate which matters].)

1 Regarding whether the agreement covers the dispute or claims at issue, Defendants
 2 concede that the Plaintiff's individual Private Attorney General Act (PAGA) claims are not
 3 subject to binding arbitration as a matter of law. (*Iskanian v. CLS Transp. Los Angeles, LLC*
 4 (2014) 59 Cal.4th 348, 382 (hereafter *Iskanian*); *Tanguilig v. Bloomingdale's, Inc.* (2016) 5
 5 Cal.App.5th 665.) Defendants therefore only seek to compel non-PAGA claims and Plaintiff
 6 does not dispute that the DRA/DRRP purports to encompass these, including the provision that
 7 such claims shall not be arbitrated on a class or representative basis. Consequently, there is no
 8 dispute with respect to Plaintiff's causes of action falling within the ambit of the DRA/DRRP.
 9

10 Plaintiff further argues unconscionability, a defense to enforcement of an arbitration
 11 agreement as with any contract. (Code Civ. Proc. § 1281; *Armendariz v. Found. Health*
 12 *Psychcare Servs., Inc.* (2000) 24 Cal.4th 83 (hereafter *Armendariz*).) Plaintiff also argues
 13 illegality based on the "concerted action" provisions of the pre-emptive National Labor Relations
 14 Act (NLRA), placing sole reliance on *Morris v. Ernst & Young* (9th Cir. 2016) 834 F.3d 975,
 15 979-980. However, not only are the decisions of the Ninth Circuit non-binding (*Irwin v. City of*
 16 *Hemet* (1994) 22 Cal.App.4th 507), the California Supreme Court held in *Iskanian, supra*, that
 17 the pro-arbitration policies in the Federal Arbitration Act do not conflict with the "concerted
 18 action" provisions of the NLRA, and therefore class waivers may be the subject of a contractual
 19 agreement, such as that contained in the DRA/DRRP. (*Iskanian, supra* at pp. 372-73.)
 20 Moreover, the United States Supreme Court granted a writ of certiorari in *Morris, supra*,
 21 consolidated it with two other cases, and heard oral argument on October 2, 2017, with final
 22 opinion presently pending. (*Morris v. Ernst & Young, LLP* (cert. granted 2017) ___ US ___, 137
 23 S.Ct. 809.) In short, the DRA/DRRP is not void for illegality on the basis of its class-waiver
 24 provisions, at least at present under California law.
 25

26 Regarding unconscionability, both "procedural" and "substantive" unconscionability
 27 must be present before a contract or term will be deemed unenforceable. Yet, both need not be
 28 present to the same degree. A "sliding scale" is applied so that the more substantively oppressive
 the contract term, the less evidence of procedural unconscionability is required, and *vice versa*.
 (Serafin v. Balco Props. Ltd., LLC (2015) 235 Cal.App.4th 165,178; Lhotka v. Geographic
 Expeditions, Inc. (2010) 181 Cal.App.4th 816, 821; *Armendariz, supra*, 24 Cal.4th at p. 114.)
 The burden is on the party challenging the arbitration agreement to prove both procedural and

1 substantive unconscionability. (*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th
 2 1159, 1164–1165.)

3 Regarding procedural unconscionability, Plaintiff's showing is sufficient only to
 4 demonstrate that the DRA/DRRP is a contract of "adhesion." However, courts have consistently
 5 held that the requirement to enter into an arbitration agreement is not a bar to its enforcement.
 6 (*Serafin, supra* at p. 179; *Legatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th
 7 1105, 1127.) The cases uniformly agree that a compulsory pre-dispute arbitration agreement is
 8 not rendered unenforceable just because it is required as a condition of employment or offered on
 9 a 'take it or leave it' basis. (*Id.*; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817–818
 10 [such adhesion contracts are an "inevitable fact of life for all citizens—business[person], and
 11 consumer alike"]; *Guiliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276,
 12 1292; *Sanchez v. CarMax* (2014) 224 Cal.App.4th 398 [the adhesive nature of the agreement is
 13 evidence of some degree of procedural unconscionability but, without more, it is minimal].)
 14 Accordingly, the Court finds that the adhesive nature of the DRA/DRRP supplies, at most, a
 15 minimal degree of unconscionability.

16 Regarding substantive unconscionability, Plaintiff's arguments may be generally grouped
 17 into three categories: inadequate discovery; lack of mutuality; and unfair cost burdens.

18 As for discovery, *Armendariz* recognized that one of the purposes of arbitration is to
 19 provide a simpler, informal and expeditious alternative to civil litigation, and that reasonable
 20 limits on discovery properly serve that end. (*Armendariz, supra*, at p. 106 fn. 11; *Sanchez,*
 21 *supra*, at p. 404.) Here, the Court finds that Plaintiff's objections are either erroneous or do not
 22 demonstrate any significant impairment to a full and fair presentation of his case at arbitration.
 23 The Court makes this finding because any limits on discovery may be exceeded in the
 24 arbitrator's discretion using substantially similar discretion to that accorded under the Civil
 25 Discovery Act, because the arbitrator may resolve any disputes arising over discovery and
 26 because the arbitrator has the express power to compel witnesses and order further discovery.
 27 (*Ross Dec.*, Exh. A, DRRP, Rules 8 – 9.)

28 As for mutuality, Plaintiff's objections have been considered and rejected as a basis to
 deny enforcement in published opinions in which Defendants (or related entities) were parties

1 and in which a similar, if not identical, version of the DRA/DRRP was challenged
 2 unsuccessfully. (*Casas v. CarMax Auto Superstores California, LLC.* (2014) 224 Cal.App.4th
 3 1233, 1237 [unilateral modification provision of DRRP not unconscionable due to implied
 4 covenant and savings clause]; *Sanchez v. CarMax Auto Superstores California, LLC.* (2014) 224
 5 Cal.App.4th 398, 403 [“we agree that the agreement is not unilateral”].) Indeed, it appears that
 6 nearly all of Plaintiff’s substantive unconscionability arguments were made and rejected in
 7 *Sanchez, supra.* (*Id.*, at pp. 406 – 409.) While Plaintiff objects that Defendants have not
 8 established identity of language between the DRA/DRRP at issue here and in the published
 9 cases, Plaintiff does not proffer any significant distinction between the operative provisions. As
 10 published opinions, the holdings are *stare decisis* provided their facts are merely analogous,
 which they indisputably are.

11 As for costs, the Court does not interpret the subject provision as obligating Plaintiff to
 12 bear the costs of other, non-noticing parties’ transcripts; the Court finds the plain meaning of the
 13 DRRP unambiguously imposes no costs on employees for arbitration that would run afoul of
 14 *Armendariz* requirements. To the extent Defendants were to insist otherwise, Rule 18 of the
 15 DRRP provides that any terms contrary to law may not be enforced, thereby permitting the
 16 arbitrator to reject imposition of such costs on Plaintiff. (See Ross Dec., Exh. A, DRRP, Rule
 17 18.) In sum, the Court finds neither a significant nor pervasive degree of substantive or
 18 procedural unconscionability sufficient to deny enforcement of the DRA/DRRP.

19 Plaintiff’s procedural objection to the Defendants’ notice of motion is unpersuasive.
 20 Defendants’ identified the precise orders being sought, *i.e.*, to compel arbitration and to stay the
 21 case pending completion, and it also adequately identifies the factual and legal grounds for doing
 22 so. This satisfies the statutory purpose. (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268,
 23 1278.) Plaintiff’s own reference to Code of Civil Procedure sections 1281 and 1281.2
 24 demonstrates that he understood the nature of and basis for the motion. (*Simonini v. Jay Dee*
 25 *Leather Products Co.* (1948) 85 Cal.App.2d 265 [motion fell within one of only two possible
 26 grounds]; *Shields v. Shields* (1942) 55 Cal.App.2d 579 [vague notice cured by accompanying
 27 affidavit and notice].)

28

1 Except as noted below, Defendants' Request for Judicial Notice is granted, but only as to
2 facial matters and not as to the truth of any disputed factual issues. As to Defendants' Request
3 for Judicial Notice (Exhibits 2 and 3), Plaintiff's objections 3 and 4 are sustained. As to
4 Defendants' (Supplemental) Request for Judicial Notice (Exhibits 4 and 5), Plaintiff's objections
5 3, 4, 7 and 8 are sustained. Plaintiff's objections 3, 4, 7, 8, 11, 12, 15, 16, 19, 20, 23, 24, 27, 28,
6 32, 34, 38, and 40 to Defendants' Second Supplemental Request for Judicial Notice are
7 sustained. All other objections to each Request for Judicial Notice are overruled. Plaintiff's
8 evidentiary objections to the Defendants' declarations are also overruled.

9 **ORDER:**

10 Defendants' Motion to Compel Arbitration and for Stay of Judicial Proceedings is
11 GRANTED. (Code Civ. Proc. §§ 1281.2, 1281.4.) The Class Allegations are DISMISSED.
12

13 Dated: 5/15/18


14 JOHN D. FREELAND
15 Judge of the Superior Court

PROOF OF SERVICE BY MAIL
[1013a(3) C.C.P.]

STATE OF CALIFORNIA)
) SS
COUNTY OF STANISLAUS)

I am over the age of 18 years and employed by the Superior Court of the State of California, County of Stanislaus, and not a party to the within action. I certify that I served a copy of the attached **STATEMENT OF DECISION ON DEFENDANTS CARMAX AUTO SUPERSTORES CALIFORNIA, LLC., AND CARMAX AUTO SUPERSTORES WEST COAST, INC.,'S MOTION TO COMPEL ARBITRATION AND STAY JUDICIAL PROCEEDINGS** by placing said copy in an envelope addressed to the following:

Shannon Seibert
SEIBERT BAUTISTA MONTOYA
22 Battery Street, Ste. 888
San Francisco, CA 94111

Jack Sholkoff
OGLETREE DEAKINS
400 South Hope Street, Ste. 1200
Los Angeles, CA 90071

Said envelope was then sealed and postage thereon fully prepaid, and thereafter was on May 15, 2018 deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 2018 at Modesto, California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF STANISLAUS

By


Debbie Cerda, Deputy Clerk

